Supreme Court, U.S.
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No.

In the Supreme Court of the United States

CATHERINE COATNEY, an individual
AND dba CATHERINE COATNEY DESIGNS,
Petitioner,

v.

STEPHANIE KING,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of California, County of San Francisco Appellate Division

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Due process demands that appellate panel judges cannot be placed in a position that may require them to weigh their own interests against fairly disposing of appeals before them. California's Superior Court Appellate Division Panels regularly require superior court judges to hear appeals from their colleagues' decisions or, worse, require junior judges to hear appeals from decisions by more senior judges who may control their assignments. In either case, the system creates a strong incentive to "go along to get along," without regard to the decision at hand. Does such a system violate due process by denying an appellant a fundamentally fair appellate forum?

LIST OF PARTIES

All of the parties to this case are individuals who are listed in the caption.

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2. *Because of the risks to an appellate panel judge's career should he overturn a colleague's decision, such judges have a temptation to ignore the merits of the case before them – a temptation antithetical to the impartiality to which the parties are entitled as a matter of right.* 18

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I. OPINION BELOW

A San Francisco Superior Court Appellate Division Panel, composed in violation of due process requirements, issued its decision affirming the trial court on August 24, 2004. The same Panel, on September 16, 2004, issued a decision denying a request that the case be transferred to the California Court of Appeal. On October 13, 2004, the California Court of Appeal itself denied petitioner's request to have the matter transferred to the Court of Appeal for review, a transfer that included rejecting petitioner's argument – made for the first time – that the Superior Court Appellate Division Panel's structure was such that it denied petitioner her due process rights. (*See* Appendices A-E) The California Supreme Court refused even to accept for filing a Petition for Review challenging the Court of Appeal's decision. (*See* Appendix F) The Court of Appeal's rejection therefore stands as the decision by the highest available court in California.

II. STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257(a) (West 2004).

The California Court of Appeal denied petitioner's request for review on October 13, 2004. The California Supreme Court refused to accept the document for filing on the ground that Cal. Rules of Court, Rule 28(a)(1) (West 2004) precludes review by the California Supreme Court.[1]

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[1] *Snukal v. Flightways Mfg., Inc.*, 23 Cal.4th 754, 764 (2000).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. amend XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The provisions of Cal. Civ. Proc. § 77 (West 2004), and the accompanying California Law Revision Commission comments, are lengthy and, therefore, are set out in Appendix G, pursuant to Supreme Court Rule 14.1(f). The provisions of Cal. Rules of Court, Rule 6.603 (West 2004) are also lengthy, and are set out in Appendix H, under the same rule.

IV. STATEMENT OF THE CASE

The Constitutional error here became apparent through a $17.22 claim that eventually ballooned into a $10,000 attorneys fee award underlying this petition. Petitioner's unsuccessful appeal from that fee award may well have been due to the fact that the Superior Court Appellate Division Panel was composed of judges who were on the same court as and, in all cases, junior to the judge who rendered the trial court decision. Peer review of a trial court decision would be troubling enough, but the fact that the reviewing panel included judges whose professional prospects rested in the hands of the trial judge violated the very core of appellant's due process rights. This problematic "peer review" system exists side-by-side with a statutory organizational structure that has superior court judges elect from among their own a presiding judge who has power, among other things, over judicial assignments, reviews, and vacation assignments.

A. Petitioner appeared as a claimant in San Francisco's then-existing Municipal Court.

There is a constitutional flaw inherent in California law that resulted in Petitioner being deprived of her due process rights. This flaw revealed itself after Stephanie King successfully claimed before the California Labor Commissioner that her employer, Petitioner Catherine Coatney, was late in paying $17.22 in wages. The Labor Commissioner included in its award, not only the $17.22 wage claim, but also a $480 statutory sanction against Coatney. In 1998, following a trial *de novo* in San Francisco Municipal Court, the court halved this sanction and Coatney appealed that substantive decision to the San Francisco

Superior Court Appellate Department, which then heard appeals from municipal court judgments.[2]

B. California unified its court system, doing away with its former municipal courts, and merging their functions into one over-arching superior court.

Even as Coatney brought her appeal before the Appellate Department, 1998 witnessed a significant change to that institution. In June 1998, California voters passed Proposition 220, which provided for the voluntary unification of California's superior and municipal court judges.[3] This unification means that each California county now has only *one trial court* that handles two different types of cases – limited and unlimited jurisdiction:

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[2] Cal. Civ. Proc. § 77(a) (West 1998), *superseded* ("In every county and city and county, there is an appellate department of the superior court consisting of three judges or, when the Chairperson of the Judicial Council finds it necessary, four judges.").

Cal. Civ. Proc. § 77(e) (West 1998), *superseded* ("Every appellate department under this section shall have jurisdiction on appeal from the municipal and justice courts within the county or city and county in all cases in which an appeal may be taken to the superior court as is now or may hereafter be provided by law, except such appeals as require a retrial in the superior court.").

[3] The voter initiative resulted in the creation of Cal. Const., art. VI, § 5(e) (West 2002), *repealed*, which provided in relevant part that "the municipal and superior courts shall be unified upon a majority vote of superior court judges and a majority vote of municipal court judges within the county. In those counties, there shall only be a superior court." This provision was repealed in the November 2002 general election, since all California counties had unified their superior and municipal courts.

> The parties in their briefs refer to the two departments involved in the instant trial court proceedings as the "limited civil court" (or "limited jurisdiction court"), as distinguished from the "unlimited civil court" (or "unlimited jurisdiction court"). These are misleading misnomers. *After unification, however, there is only one court – the superior court* [citation]; in the superior court, there are either limited civil cases or unlimited civil cases. [Citations.][4]

C. Independent superior court appellate departments that once reviewed municipal court judgments were replaced by superior court appellate divisions that review decisions from judges in the same superior court.

Before unification, "[s]uperior courts [had] appellate jurisdiction in causes prescribed by statute that [arose] in municipal courts in their counties."[5] After unification, the same constitutional provision was amended to state more

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[4] *Wozniak v. Lucutz*, 102 Cal.App.4th 1031, 1036, fn. 1 (2002) (emphasis added), *citing TrafficSchoolOnline, Inc. v. Superior Court*, 89 Cal.App.4th 222, 228 (2001), and Cal. Civ. Proc. §§ 85, 88, 89 (West 2004).

Broadly speaking, limited civil cases are those in which "[t]he amount in controversy does not exceed twenty-five thousand dollars. . . " (Cal. Civ. Proc. § 85(a) (West 2004)), as opposed to small claims cases, where jurisdiction cannot exceed $5,000 (Cal. Civ. Proc. § 116.220(a) (West 2004)). The remaining civil cases, as well as declaratory relief claims, fall within the Superior Court's unlimited civil jurisdiction.

[5] Cal. Const. art. VI, § 11 (West 1998), *superseded*.

generally that "the appellate division of the superior court has appellate jurisdiction in causes prescribed by statute."[6] To clarify that a new regime controlled, the former superior court "appellate department" in each court became an "appellate division."[7]

As part of this same package of amendments, the California Constitution was amended to require that the newly constituted appellate divisions function independently:

> In each superior court there is an appellate division. The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial

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[6] Cal. Const. art. VI, § 11(b) (West 2004). The only exception placed on § 11(b) is that the jurisdiction must comport with that in Cal. Const. art. VI, § 11(a) (West 2004), which provides that "[t]he Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute. When appellate jurisdiction in civil causes is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy."

[7] To this end, in 1998, Cal. Civ. Proc. § 77, the statute effectuating the constitutional amendment creating the new appellate divisions, was "amended throughout to replace references to the appellate department with references to the appellate division. . . . This is consistent with the terminology used in Constitution Article VI." 28 Cal. Law Rev. Com. Reports App. 7 (1998).

> Council *to promote the independence of the appellate division.*[8]

Acting on the Constitutional imperative regarding the creation of appellate divisions within the newly unified superior courts, the Legislature amended Calif. Code Civ. Proc. § 77:

> In every country and city and county, there is an appellate division of the superior court consisting of three judges or, when the Chief Justice finds it necessary, four judges.
>
> The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council *to promote the independence and quality of each appellate division*. Each judge assigned to the appellate division of a superior court *shall be a judge of that court*, a judge of the superior court of another county, or a judge retired from the superior court or a court of higher jurisdiction in this state.[9]

As can be seen from the quoted language, the statute expressly recognizes the need for panel independence.[10]

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[8] Cal. Const. art. VI, § 4 (West 2004) (emphasis added).

[9] Cal. Civ. Proc. § 77(a) (emphasis added).

[10] The California Law Revision Commission comments regarding § 77 also emphasize the necessity of an independent appellate panel:

Nevertheless, the statute, by allowing a panel composed of judges drawn from the same court issuing the decisions to be reviewed (and in many cases, such as here, asking junior judges to review decisions by senior judges), actually authorizes a constitutionally defective panel.

The fact that § 77 allows San Francisco to have an appellate system staffed with judges who are peers of (and junior to) those whose decisions are under review means that the appellate system cannot be truly independent. And as this petition demonstrates, despite the system's failure as constituted to meet due process requirements, litigants trapped within this system have no right to reach a forum that can correct these infirmities. Coatney's own travails graphically illustrate the system's inability to correct its structural defects.

> Subdivision (a) requires adoption of court rules intended to promote the independence and quality of judges serving in the appellate division. *See Cal. Const. art. VI, § 4 (expressly recognizing the goal of promoting the independence of the appellate division).*

Cal. Civ. Proc. § 77, Law Revision Commission Comments (West 2004) (emphasis added).

The Law Revision Commission is the government body assigned the task of reviewing the law for reforms, analyzing proposed legal changes from "learned bodies," receiving input from judges and the public regarding problems with existing law, recommending changes to existing law to ensure that the law is modern and equitable. Cal. Gov't Code § 8293 (West 2004).

D. The peer review appellate system exists side-by-side with a system by which judges, on a regular basis, elect one of their own to serve in a powerful administrative capacity.

San Francisco Superior Court, in common with all other California superior courts having three or more judges, must "select a presiding judge by a secret ballot in accordance with the court's internal policies."[11] The presiding judge's position is a very powerful one. At a general level, the presiding judge is responsible for setting court policies.[12] At a more specific level, he is responsible for the working conditions of judges at the Superior Court, including assigning judges amongst the various departments and assigning cases to specific judges.[13] The presiding judge has some control over the judge's private lives, insofar as he is responsible for scheduling vacations and other absences.[14] The presiding judge is also responsible for monitoring the other judges in the Court to ensure that they properly carry out their duties.[15]

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[11] Cal. Rules of Court, Rule 6.602(a)(1) (West 2004).

[12] Cal. Rules of Court, Rule 6.603(a) (West 2004) ("[T]he presiding judge is responsible for leading the court, establishing policies, and allocating resources in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances service to the public.").

[13] Cal. Rules of Court, Rule 6.603(b) (West 2004).

[14] Cal. Rules of Court, Rule 6.603(c)(2) (West 2004).

[15] Cal. Rules of Court, Rule 6.603(c)(4) (West 2004).

E. Petitioner unsuccessfully appealed to an appellate panel comprised of judges were colleagues of, and junior to, the same judge who issued the decision being reviewed.

While Coatney's appeal from the $240 penalty award was pending, the Labor Commission (which represented Stephanie King) sought $5,000 in attorneys fees, payable to the government. This fee request was heard by a judge in the newly unified Superior Court. The court awarded fees, but reduced the requested amount to $3,025.

After the court issued its fee award, the Appellate Division Panel affirmed without comment the $240 in sanctions awarded against Coatney. The Labor Commissioner followed this affirmance with a request for $21,750 in attorneys fees, which the superior court (limited jurisdiction) reduced to $10,000. In 2003, Coatney appealed this fee award to the San Francisco Superior Court Appellate Division Panel.

The Appellate Division Panel denied both the appeal[16] and a subsequent request for certification of issues.[17] The Appellate Division Panel that made these two rulings is composed of four judges, all of whom are colleagues of and junior to the judge who issued the order being reviewed.[18]

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[16] Appendix A.

[17] Appendix C.

[18] The trial judge, the Hon. Alex Saldamando, was on the bench at the former Municipal Court from 1979 to 1990, when he joined the bench at the Superior Court.

F. Petitioner had no right or opportunity to present the due process problem inherent in the statutory system to either the California Court of Appeal or the California Supreme Court.

Believing that the Appellate Division Panel's denials were in error, and that these errors stemmed in significant part from the due process problem inherent in the panel's make-up, Coatney filed a petition for transfer with the Court of Appeal,[19] in which she raised the substantive matters involved in the fee request and, for the first time, a challenge to the make-up of the San Francisco Superior Court Appellate Division Panel on constitutional grounds.

Of the appellate panel judges, the senior-most, the Hon. Philip Moscone, joined the former Municipal Court in 1981, but became a Superior Court judge only in 1998, and then only as a result of Prop. 220.

The junior-most appellate panel judge, the Hon. Carol Yaggy, was a Commissioner from 1987 to 1998, and only became a judge on the Superior Court in 1999. (A commissioner is a court officers with the limited power "to perform subordinate judicial duties." Cal. Const. art. VI, § 22 (West 2004).)

The Hon. Diane Elan Wick, the Presiding Judge on the appellate panel joined the former Municipal Court in 1988, and became a Superior Court judge in 1998.

The Hon. John Conway became a Municipal Court judge in 1992 and joined the Superior Court in 1998 by operation of Prop. 220.

See D. Bogen, M. Thompson & E. Smith, *California Courts & Judges*, 220-221, 664-665, 802-803, 966-967, 986-987 (2004).

[19] Appendix D.

On October 13, 2004, the Court of Appeal, First Appellate District, denied Coatney's petition to transfer, a denial that included a refusal to review the Constitutional question at issue here.[20] Coatney attempted to petition the California Supreme Court for review of this decision, but the California Supreme Court refused even to accept the document for filing, because of limitations on its jurisdiction.[21]

In other words, Coatney has been unable to have the California court system address the due process problems inherent in the structure of the San Francisco Superior Court Appellate Division Panel. It is no surprise that the system will not address its own flaws. It requires a judicial body *outside* of the system to remedy this Constitutional problem.

V. REASONS FOR ALLOWANCE OF THE WRIT

A court that commingles trial court judges with appellate division judges – while freeing the appellate division from any obligation to explain its decision – is rife with the possibility that the appellate decision will be subject to improper influences impairing parties' due process rights.

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[20] Appendix E.

[21] Appendix F. Cal. Rules of Court, Rule 28(a)(1) (West 2004).

VI. REVIEW IS REQUIRED BECAUSE THE STATUTE ESTABLISHING CALIFORNIA'S APPELLATE DIVISIONS VIOLATES DUE PROCESS BY AUTHORIZING A SYSTEM (USED IN SAN FRANCISCO SUPERIOR COURT) THAT GIVES JUDGES AN INTEREST IN A CASE'S OUTCOME.

A. Due process demands that an appellate tribunal must have judges who have no incentive to place their own interests ahead of the parties' interests.

The United States Constitution, in both the Fifth and Fourteenth amendments, guarantees due process of law.[22] One of the basic due process requirements under both

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[22] U.S. Const. amend XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

amendments is the right to a fair trial in a fair tribunal.[23] Inherent in the concept of a "fair tribunal" is the requirement that the tribunal's judges do not have any interest, however indefinable, in a case's outcome.[24]

The test for determining whether a tribunal is biased is to examine whether a specific situation, when paired with ordinary human weaknesses and foibles, would tempt even honest judges to place their own interests ahead of the interests of the parties before them:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.[25]

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[23] "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955).

[24] *In re Murchison*, *supra*, 349 U.S. at 1. *See also Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147-148 (1968), *reh'g denied*, 393 U.S. 1112 (1969) (holding that the same principles apply to an arbitrator).

[25] *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927). *See also Dyas v. Lockhart*, 705 F.2d 993, 996-97 (8th Cir. 1983), *cert. denied sub nom. Lockhart v. Dyas*, 464 U.S. 982 (1983) ("The test in determining if a judge's bias should be presumed in a particular case is whether, realistically considering psychological tendencies and human weaknesses, the judge would be unable to hold the proper balance between the state and the accused. [Citations.] In making this inquiry we, of course, presume the honesty and integrity of those serving as judges. [Citation.]").

Parties who must appear before a tribunal are not the only ones who benefit from a system that minimizes the judges' exposure to temptation. Due process requires a system that supports impartiality to ensure that our judicial system maintains the public's respect[26] – without which it becomes ineffectual and meaningless.

This emphasis on public respect includes eliminating not only bias, but also the appearance of bias:

> The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice."[27]

Thus, it does not matter whether the appellate panel here actually engaged in wrongful acts. It is the State's responsibility to "properly protect the judicial process from being misjudged in the minds of the public."[28]

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[26] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-860 (1988) (referring to 28 U.S.C.A. § 455 (West 2004)); *United States v. Brinkworth*, 68 F.3d 633, 637 (2d Cir. 1995) (recusal of judge based on appearance of partiality reflects paramount concern with judicial integrity).

[27] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986), *citing Murchison*, *supra*, 349 U.S. at 136.

[28] *Cox v. State of Louisiana*, 379 U.S. 559, 565 (1965), *reh'g denied sub nom. Cox v. Louisiana*, 380 U.S. 926 (1965).

Even here, when the right to appeal is only statutory,[29] once an appeal is authorized at law, it must comport with due process requirements.[30]

B. The San Francisco Superior Court Appellate Division Panel is set up so that judges hearing appeals have a vested professional interest in routinely affirming (and never reversing) the decisions under review.

1. ***Appellate Division Panel judges are drawn from within the Superior Court, and will inevitably find themselves called upon to review decisions by judges senior to them, and by judges who could conceivably elect panel judges as presiding judge or could eventually be presiding judges themselves with all the power that entails.***

As is discussed at greater length, above, the San Francisco Superior Court Appellate Division Panel, consistent with California statutory authority, is composed of judges from within the Superior Court itself who are called upon to review their colleagues' decisions in limited jurisdiction cases. This appellate panel configuration functions in a Court system that also requires that superior court judges, on a regular basis, secretly elect one of their own to be a presiding judge. The presiding judge does not hold a nominal or symbolic position; it is a position of very real power. To the extent that every judge may aspire to that position, and that no judge wishes to be on the wrong side of the current presiding judge, it places

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[29] Cal. Civ. Proc. §§ 77(d) & 904.2 (West 2004).

[30] *Frank v. Mangum*, 237 U.S. 309, 327 (1915).

an impossible burden on San Francisco Superior Court judges to demand that they conduct appellate review of their colleague's decisions.

Thus, given the presiding judge's far-reaching power at the superior court, it would either be a very brave or very foolhardy appellate panel judge who would even occasionally overturn his colleagues' judgments – even if those judgments are legally infirm and deserve to be challenged. Any judge who has a reputation as a "troublemaker" on this basis would find himself barred from the presiding judge's seat of power, since it is unlikely that his colleagues would vote for him. As significantly, he could find himself in a position where the presiding judge of the moment views him with hostility, an enmity that can be played out in the renegade judge being assigned to unpopular departments, receiving difficult or unpleasant cases, and routinely being denied requested vacations or other absences.

In addition, as demonstrated in footnote 18, above, there is nothing to prevent appellate panel judges from being junior to the judge whose decision they are called upon to review. The tensions inherent in having a judge new to the superior court system reverse a senior judge are considerable. The most logical way for any judge, even a model of rectitude, to get along is to go along.[31]

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[31] Or, as Sam Rayburn (1882-1961), U.S. Legislator, is reputed to have said, "If you want to get along, go along." N. MacNeil, *Forge of Democracy*, ch. 6 (1963).

2. *Because of the risks to an appellate panel judge's career should he overturn a colleague's decision, such judges have a temptation to ignore the merits of the case before them – a temptation antithetical to the impartiality to which the parties are entitled as a matter of right.*

Since the judges on the San Francisco Superior Court Appellate Division Panel face serious consequences if they alienate their peers – because any one of those peers could become a presiding judge, because each appellate panel member may hope in future to be a presiding judge, and because junior judges may be forced to reverse senior judges – each appellate panel judge has an interest in the outcome of an appeal that is antithetical to impartiality.

Everyone recognizes that a system that permits a judge to preside over a case in which the judge has a pecuniary interest is manifestly infirm.[32] For example, in *Tumey v. State of Ohio*, *supra*, 273 U.S. 510, the seminal case identifying as fundamentally harmful a judicial system in which the judge has an automatic interest in the outcome of each case before it, the judge received a fee for each criminal conviction he meted out.

Significantly, however, a direct financial benefit is not the only factor that might tempt a reasonable judge to rule on grounds other than the merits of the case. As appears here,

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[32] *Jones v. Luebbers*, 359 F.3d 1005, 1013 (8th Cir. 2004), *reh'g and reh'g en banc denied, cert. denied* ___ S.Ct.___, 2004 WL 2330707 (Dec. 6, 2004) ("Where a judge's interest in the outcome of a case is pecuniary, application of the rule from *Murchison* [*supra*] and *Tumey* [*supra*] is simple and the need for disqualification usually will be clear.").

the due process problem can arise from a system set up so that specific case outcomes affect the judge's overall function. In *Ward v. Village of Monroeville, Ohio*,[33] this Court found unconstitutional a system by which the Mayor could swell the city coffers (as opposed to his personal finances) through convictions. The Supreme Court in *Ward* noted that the situation before it was analogous to that in *Tumey*, since

> the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . . ." *Id.* [*Tumey*], at 532, 47 S.Ct., at 444. Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Id.* [*Tumey*], at 534, 47 S.Ct., at 445.[34]

Federal law has codified this ruling, mandating that judges may not review a matter in which that judge has an interest – any interest – that might be substantially affected by the proceeding's outcome:

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[33] *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972).

[34] *Ward, supra*, 409 U.S. at 60.

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. [¶] (b) He shall also disqualify himself in the following circumstances: *** (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, *or any other interest that could be substantially affected by the outcome of the proceeding*.[35]

Likewise, in certain federal administrative areas, the statutory scheme recognizes that it is constitutionally necessary for persons charged with adjudicative responsibilities not to have to weigh in on their colleagues. For example, under the "Education for All Handicapped Children Act" (20 U.S.C. § 1401 *et seq*. (West 2004)), the federal government gives assistance to states charged with educating handicapped children. Parents who dispute the way in which the state is carrying out its mandate under the act have the absolute right to an "impartial due process hearing."[36]

Significantly, to ensure the impartiality called for in the Act, the Congressional Conference Committee Report stated

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[35] 28 U.S.C.A. § 455 (emphasis added).

[36] 20 U.S.C.A. § 1415(f) (West 2004) ("[T]he parents involved in such complaint [authorized under the Act] shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.").

that "any hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer since the State or local agency or intermediate unit will be party to any complaint presented."[37]

3. ***The standard for challenging a judge on due process grounds tied to the judge's failure to be impartial are more easily met when the challenged conduct occurs without a requirement that the court disclose the basis for its decision.***

Weighing in the balance against the constitutionality of San Francisco Superior Court's Appellate Division Panel is the fact that the Panel functions in secrecy since the appellate panel is not required to render a written decision.[38] When a written opinion is not required, a tainted judge need not risk demonstrating that his decision did not accord with governing legal principles. When a judge's possible bias arises in the context of closed proceedings, "the appearance of []partiality is great, application of the rule is simple, and due process may require disqualification."[39]

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[37] S.Conf.R. No. 94-455, 94th Cong., 1st Sess. 49 (1975), reprinted in (1975) U.S.Code Cong. & Ad.News 1425, 1480, 1502. *See also Helms v. McDaniel*, 657 F.2d 800, 802-803 (5th Cir. 1981), *reh'g denied* 664 F.2d 291 (5th Cir. 1981), *cert. denied sub nom. McDaniel v. Helms*, 455 U.S. 946 (1982).

[38] Cal. Rules of Court, Rule 106(b) (West 2004).

[39] *Jones v. Luebbers*, *supra*, 359 F.2d at 1013 (criminal defendant charged state trial court judge with bias during a private contempt hearing; judge's refusal to recuse himself affirmed, but higher standard identified for closed proceedings). In the printed

C. Because Cal. Civ. Proc. § 77, as written and as implemented, is constitutionally flawed, this Court must intervene.

Section 77 of the California Code of Civil Procedure contains a harmful fundamental constitutional flaw since it staffs appellate division panels with judges who may be tempted to place their own interests ahead of the interests of justice. The San Francisco Superior Court Appellate Division Panel demonstrates that this statutory flaw results in a system that encourages judicial bias.[40] Situations in which there is a high probability that a decision-maker will be biased are constitutionally intolerable.[41] For this reason, a judicial systems' manifest structural infirmity presents a

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decision, the quoted language actually uses the word "impartiality," but this appears to be a typographical error, since it makes no sense in context.

[40] "A 'structural' error . . . is a 'defect affecting the framework within which the trial proceedings, rather than simply an error in the trial process itself [citation].'" *Johnson v. United States*, 520 U.S. 461, 468 (1997).

[41] *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' *In re Murchison, supra,* 39 U.S., at 136, 75 S.Ct. at 625; *cf. Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 747 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judgment or decisionmaker is too high to be constitutionally tolerable.")

fundamentally harmful due process error that must always be addressed.[42]

CONCLUSION

The right to a fair proceeding before an unbiased judge is a fundamental due process right. Calif. Civ. Proc. § 77, however, creates an appellate system at the superior court level that tempts panel judges to place their own interests ahead of the parties' interests. As such, the statute is constitutionally flawed, and the system created under the statute has a structural error that must be addressed.

Petitioner therefore respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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(415) 399-1000

Attorneys for Petitioner

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[42] "There are a few errors that are not subject to harmless error analysis because they are so fundamentally harmful that they amount to reversible error per se. These include . . . trial before a biased judge. . . ." Moore's Federal Practice, vol. 19, ch. 206, § 206.07[3], *citing to Tumey v. Ohio*, *supra*, 273 U.S. at 535.

APPENDIX A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
APPELLATE DIVISION

Appellate No. 149975
Limited Jurisdiction No. 149975

[Filed August 24, 2004]

STEPHANIE KING,	)
Plaintiffs/Respondent,	)
	)
v.	)
	)
CATHERINE COATNEY, an individual AND dba CATHERINE COATNEY DESIGNS,	)
Defendants/Appellant.	)

ORDER AFFIRMING JUDGMENT OF THE TRIAL COURT

This matter came on for hearing on July 23, 2004. After considering the evidence, applicable law and oral arguments, the Court AFFIRMS the trial court's Order Granting Plaintiff's Motion for Reasonable Attorney Fees.

Pursuant to CCP § 1034 and California Rules of Court 135(a), (b) and (c), the costs are hereby awarded to the prevailing party.

IT IS SO ORDERED.

DATE: August 23, 2004

/s/ _____
John J. Conway, Associate Judge

/s/ _____
Carol Yaggy, Presiding Judge

/s/ _____
Peter Busch, Associate Judge

APPENDIX B

MUNICIPAL COURT OF THE STATE OF CALIFORNIA CITY AND COUNTY OF SAN FRANCISCO

Case No. 149975

[Filed October 24, 2003]

STEPHANIE KING, Plaintiff/Respondent,	)
v.	)
CATHERINE COATNEY, an individual, dba CATHERINE COATNEY DESIGNS, Defendant/Appellant.	)

ORDER GRANTING PLAINTIFF'S MOTION FOR REASONABLE ATTORNEY FEES

Defendant's Motion to Tax Costs and Plaintiff's Motion for Reasonable Attorney's Fees in this case came on regularly for hearing, on October 16, 2003 at 4:00 p.m. in Department 318 of the above-entitled court, located at 400, McAllister Street, San Francisco, CA 94102, before the Honorable Alex Saldamando, Judge of the Superior Court. Plaintiff/Respondent, and moving party on the Motion for

Reasonable Attorney Fees, STEPHANIE KING, appeared through Anne Hipshman, attorney of record. Defendant/Appellant, and responding party, CATHERINE COATNEY, appeared through counsel of record Mattaniah Etyan.

After considering the papers filed in favor of and in opposition to the motion, and argument at the time of hearing thereon, and good cause appearing therefore,

IT IS HEREBY ORDERED that the motion for reasonable attorney's fees is granted. Plaintiff is awarded reasonable attorney's fees incurred for the appellate work performed on this case in the amount of $10,000.00.

Dated: 10-24-03

/s/ _____
Judge of the Superior Court

Approval as to Form
Dated: October , 2003

LAW OFFICES OF MATTANIAH EYTAN

By _____
MATTANIAH EYTAN, Attorneys for
Defendant/Appellant,
CATHERINE COATNEY

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
APPELLATE DIVISION

Limited Jurisdiction Case No. 149975

[Filed September 16, 2004]

STEPHANIE KING Plaintiff/Respondent,	)
v.	)
CATHERINE COATNEY, an individual d.b.a. CATHERINE COATNEY DESIGNS, Defendant/Appellant.	)

ORDER DENYING REQUEST FOR CERTIFICATION
(California Rules of Court, Rule 63)

The Request for Certification to the Court of Appeals pursuant to California Rule of Court 63 is hereby DENIED.

IT IS SO ORDERED.

Dated: September 16, 2004

/s/ _____
Hon. Carol Yaggy
Associate Judge

/s/ _____
Hon. John J. Conway
Associate Judge

/s/ _____
Hon. Peter J. Busch
Associate Judge

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

[Filed September 4, 2004]

STEPHANIE KING, Plaintiff & Respondent,	)
v.	)
CATHERINE COATNEY, an individual and d.b.a. CATHERINE COATNEY DESIGNS, Defendant & Appellants.	)

PETITION FOR TRANSFER [C.R.C., Rule 64]

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
APPELLATE DIVISION

Limited Jurisdiction Case No. 149975

[Filed September 16, 2004]

STEPHANIE KING Plaintiff/Respondent, v. CATHERINE COATNEY, an individual d.b.a. CATHERINE COATNEY DESIGNS, Defendant/Appellant.	)

ORDER DENYING REQUEST FOR CERTIFICATION
(California Rules of Court, Rule 63)

The Request for Certification to the Court of Appeals pursuant to California Rule of Court 63 is hereby DENIED.

IT IS SO ORDERED.

Dated: September 16, 2004

/s/ _____
Hon. Carol Yaggy
Associate Judge

/s/ _____
Hon. John J. Conway
Associate Judge

/s/ _____
Hon. Peter J. Busch
Associate Judge

I. ISSUES PRESENTED

Issue No. 1

Whether the Labor Commissioner, when claiming attorneys fees, may rely on a special statutory scheme in order to avoid a general statutory scheme?

Issue No. 2

In the context of a limited jurisdiction case, is a fee award that is layered on top of statutory sanctions invalid if it bears no rational relationship to the underlying judgment?

Issue No. 3

As a general rule in California, if an employer during a trial *de novo* betters its position, without actually prevailing, does an inordinately heavy penalty in the form of attorneys fees comport with the United States Supreme Court's recent pronouncement that lower punitive awards are to be preferred unless the defendant's underlying conduct is particularly egregious?

Issue No. 4

Whether an appellate division panel is unconstitutional if the judges on the panel are junior to the judge whose decision they are reviewing?

II. BACKGROUND

After respondent Stephanie King successfully claimed that her employer, appellant Catherine Coatney, was late in paying $17.22 in wages, the Labor Commissioner imposed $480 in

statutory sanctions against Coatney. Following a trial de novo, the trial court awarded King $240 in sanctions (an amount that was half that which the Labor Commissioner originally awarded).

Relying on Calif. Labor Code § 98.2(b), the trial court ruled that, although Coatney bettered her position through the de novo trial, the fact that she did not reduce the award against her to zero meant that she had to pay a sanction for an unmeritorious appeal, the sanction to take the form of attorneys fees. Accordingly, the Labor Commissioner, which represented King at the trial *de novo,* sought $21,750 in attorneys fees, a request the trial court reduced to $10,000. Coatney contended that even this amount was erroneously awarded, and appealed the award.

The Appellate Division panel denied both the appeal and a subsequent request for certification of issues. The Appellate Division panel in this case is composed of judges who are peers of the judge who issued the order being reviewed.

The issues set forth above, however, are of sufficient legal importance that they should be reviewed by the Court of Appeal.[1]

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[1] Coatney has already sought certification from the Appellate Division panel as to Issues 1 - 3. Issue 4, which attacks the Appellate Panel's own composition, is raised here for the first time.

III. WHY REVIEW SHOULD BE GRANTED

A. Issue No. 1, regarding the Labor Commissioner's ability to circumvent general legislation aimed at preventing the Labor Commissioner from seeking attorneys' fees from employers, violates the Constitutional prohibition against allowing a special statute to override an applicable general statute.

The Labor Commissioner may challenge employment practices either under a general statutory scheme[2] (which explicitly denies the government attorneys fees) or under a special statutory scheme[3] (which explicitly allows such fees). The government used the special statutory scheme as a basis to have fees imposed against the employer, Catherine Coatney.

The government's apparent ability to circumvent the fee prohibition under the general scheme, and benefit from the narrow right to fees under the special scheme is an important legal issue since it implicates constitutional concerns. The California Constitution mandates that "[a] local or special statute is invalid in any case if a general statute can be made applicable."[4] Under this constitutional provision, "[a] law is special. . . when it is not founded on a natural, intrinsic, or constitutional distinction which reasonably justifies difference

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[2] Calif. Labor Code § 218.5.

[3] Calif. Labor Code § 98.2(b).

[4] Calif. Const., art. IV, § 16(b).

in treatment."[5] The type of distinction the Constitution calls for does not appear here.

This issue also has important public policy concerns. As matters now stand, if the Labor Commissioner is allowed to use the special legislation in Calif. Labor Code § 98.2(b) to circumvent a general proscription against its collecting attorneys fees in *de novo* trials, in situations in which a sanction against an employer is genuinely merited, the Labor Commissioner will be encouraged to impose inflated sanctions, on the theory that it's a no-lose situation.

If the employer acquiesces without seeking appeal through a trial *de novo,* the Labor Commissioner's office can view itself as Robin Hood - taking from the "rich" (i.e., the employer) and giving to the "poor" (i.e., the employee), and :regardless of the legal justification for that payment. If the employer objects to this gratuitous overcharge, the benefit to the labor Commissioner for rendering this improper ruling increases. Under Calif. Labor Code § 98.2(b), an employer who seeks *de novo* review of Labor Commissioner sanction is forced to pay attorneys fees unless it reduces the Labor Commissioner award to zero. Since our hypothetical here supposes a situation in which some penalty was required, and the Labor Commissioner merely inflated it, the employer cannot reduce the penalty to zero, the Labor Commissioner, which is already funded by taxpayers, can use this special legislation to obtain a windfall at the employer's expense. This hypothetical scenario, which precisely parallels the facts in this case, is unfair, illegal, rewards improper government

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[5] *Lelande v. Lowery* (1945) 26 Cal.2d 224, 232 [157 P.2d 639].

conduct, and is completely destructive to California businesses.

This Court should therefore determine whether the Labor Commissioner can unilaterally decide to invoke a special rule that encourages it to abuse its authority, when there is a general rule in place that prevents that type of abuse.

B. Issue No. 2 is significant because the policy underlying California authority placing a jurisdictional cap on fees should also apply in cases where the attorneys fees are grossly disproportionate to sum at issue in the case.

In this limited jurisdiction case, the trial court awarded, and the appellate division affirmed, fees that are five hundred eighty-one times greater than the unpaid wages that gave rise to the right to fees, and forty-two times greater than the penalty imposed for late payment of wages. Given that this fee award bears no rational relationship to the underlying judgment, does it violate the United Supreme Court's prohibition against excessive penalties?

California Courts have not addressed the proportionate relationship between attorneys fees and awards in a limited jurisdiction case. Only one published decision comes even close to addressing the issue, since it places a jurisdictional cap on fees by holding that the fees, when combined with the judgment, may not exceed the jurisdictional limit.[6] Even that case, however, does not address a situation, such as that found here, where the judgment imposes a nominal payment on the

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[6] *Bakkebo v. Municipal Court* (1981) 124 Cal.App.3d 229, 236 [177 Cal.Rptr. 239].

defendant, and the attorneys fees are a disproportionate multiplier of that amount. This Court should set proportionality guidelines for all current and future claimants in limited jurisdiction actions.

C. Issue No. 3 is significant because it allows this Court to bring California law in line with the ruling from the United States Supreme Court that enormous punitive damage awards should only be applied in cases involving egregious conduct.

Although, at the trial *de novo,* Coatney was unable to reduce the Labor Commissioner's penalty against her to zero, she successfully halved that penalty, reducing it from $480 to $240. Nevertheless, as a penalty on top of that penalty, the trial court imposed attorneys fees against her that are 581 times greater than the unpaid wages that gave rise to the right to fees, and 42 times greater than the penalty imposed for late payment of wages.

In other words, as discussed at greater length, above, the Labor Commissioner was rewarded (above and beyond the monies it already receives annually from taxpayers) for having imposed an improperly inflated sanction in the first place. The United States Supreme Court recently held that lower punitive awards are to be preferred unless the defendant's underlying conduct is particularly egregious.[7] There are good reasons to conclude that the trial court award here violates the principles underlying the Supreme Court's decision.

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[7] *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585].

The United States Supreme Court held that, in punitive damage cases, useful guidelines would suggest that punitive damages be limited to about nine times the underlying award, with a preferred target of four times the underlying award. The Supreme Court acknowledged that, "[w]hile these ratios are not binding they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process. . . ."[8]

> Significantly, the Supreme Court continued by noting that, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios grater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'[9]

The question, then, is whether, in statutory penalty cases where a defendant employer successfully proves that the Labor Commissioner imposed incorrect penalties in the first instance, the employer's success at trial can be characterized as egregious conduct that entitles the Labor Commissioner to penalties (in the form of attorneys fees) that are hundreds of times greater than the underlying wages at issue. The inherent absurdity in equating success at trial with egregious conduct leaves little doubt as to the proper answer.

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[8] *Id* at 538 U.S. at 425, 123 S.Ct. at 1524.

[9] *Id.*

D. Issue No. 4 is significant because it gives this Court the opportunity to correct the fact that it is unconstitutional to have an appellate division panel that consists of judges with seniority and status equal to or less than the judge whose decision they are called upon to review.

Since the Superior and Municipal Courts were unified at the end of the 1990s, there is only *one court* that handles two different types of cases – limited and unlimited.[10] At the same time, the California Constitution was *explicitly* amended to ensure that this merger would not affect independent appellate review of cases that were formerly Municipal Court cases, and that are now classified as Superior Court Limited Jurisdiction Cases.[11] The Code of Civil Procedure was also amended to emphasis the necessity for *independent* appellate division review.[12]

At the time it amended the Code of Civil Procedure, the Law Revision Commission spelled out the various means by which a unified Superior Court system can promote that independence.[13] These proposals clearly conflict with the idea

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[10] *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1036, fn. 1 [126 Cal.Rptr.2d 310] (emphasis added), *citing TrafficSchoolOnline, Inc. v. Superior Court* (2001) 89 Cal.App.4th 222, 228 [107 Cal.Rptr.2d 412] and Code Civ. Proc. §§ 85, 88, 89.

[11] Calif. Const, art. VI, § 4 (emphasis added).

[12] 12 Calif. Code Civ. Proc. § 77(a) (emphasis added).

[13] Calif. Code Civ. Proc. § 77, Law Revision Commission Comments.

of an appellate division that requires forces judges to review their colleague's decisions (and raises the risk that the panel will consist of junior judges who are being asked to review a senior judge's decision).[14] This, in turn, compels the conclusion that the San Francisco Superior Court appellate division panel is structured unconstitutionally, depriving petitioner of her 5th Amendment due process rights.

Even if this issue did not implicate both state and federal constitutional concerns, it would still be especially important because the legitimacy of the common law legal system rests in large part on the faith people have in that system. Knowing that the appeal from a judge's decision will be considered by a panel senior to (or, at least, separate from) the judge who rendered the decision is just as important to the appearance of justice as the absolute right a litigant has to challenge a judge whom he believes is biased against him, regardless of his ability to "prove" that bias.[15]

The justification for the right to recuse a judge is, of course, "a substantial right and an important part of California's system of due process that promotes fair and impartial trials and confidence in the judiciary."[16] This justification applies with even greater force to the right to a

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[14] The panel composition now would be akin to a review panel on the United States Supreme Court, with Justice Ginsberg, a fairly junior judge, being called upon to review the merits of decisions by Justice Stevens, a very senior judge.

[15] Calif. Code Civ. Proc. § 170.6.

[16] *Stephens v. Superior Court* (2002) 96 Cal.App.4th 54, 61-62 [116 Cal.Rptr.2d 616].

properly constituted appellate panel. Without confidence in the judiciary, the whole system collapses.

The same focus on independent judicial function appears as well in the long-standing doctrine holding that one judge within a single court may not overrule another judge in the same court.[17] This rule is absolutely necessary to ensure continued confidence in the legal system's integrity.[18]

Of course, petitioners are not arguing that the appellate division panel's very existence violates the rule against allowing a judge within one court to review and rule upon a decision made by another judge in the same court. But one cannot ignore the fact that an appellate division's powers are narrowly "prescribed by statute."[19] This narrow grant of

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[17] *Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1361 [2 Cal.Rptr.3d 782] (noting "the general principle that one trial court judge may not reconsider and overrule a ruling by another trial court judge, unless the first judge is unavailable"). *See also Board of Medical Quality Assurance v. Superior Court* (1988) 203 Cal.App.3d 691,703 [250 Cal.Rptr. 182], *rev. denied; People v. Woodard* (1982) 131 Cal.App.3d 107, 111 [182 Cal.Rptr. 254].

[18] *In re Alberto* (2002) 102 Cal.App.4th 421,427 [125 Cal.Rptr.2d 526], *as modified.*

[19] Calif. Const., art. VI, § 11 (b) ("Except as provided in subdivision (a), *the appellate division of the superior court has appellate jurisdiction in causes prescribed by statute."* [Emphasis added]); *Smith v. City of Los Angeles Dept. of Transp.* (1997) 59 Cal.App.4th Supp. 7, 9 [73 Cal.Rptr.2d 838].

authority must be harmonized with overarching judicial policies of fairness and integrity.[20]

The Law Review Commission's analysis leaves no doubt that placing junior judges (or even co-equal judges) on an appellate panel that must consider a ruling by a colleague (especially a senior colleague) undermines public confidence in these panels. The panel judges will likely be perceived as beholden to or fearful of their colleagues on the same court.

Another problem arises because there is no way to examine the Appellate Division panel decisions for evidence of improper influences because, unlike the Supreme and Appellate courts, appellate division panels need not write decisions explaining how they arrived at the outcome of the matters before them.[21]

The requirement that Supreme Court and Appellate Court panels write decisions is designed to ensure "that the reviewing court gives careful thought and consideration to the case. . . . "[22] This "statement of reasons indicate[s] that

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[20] "As a general rule, '[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict With common law rules. [Citation.]'" *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 [65 Cal.Rptr.2d 872] (citation omitted).

[21] Calif. Const. art. VI, § 14.

[22] *People v. Rojas* (1981) 118 Cal.App.3d 278, 288 [174 Cal.Rptr. 91].

appellant's contentions have been reviewed and consciously, as distinguished from inadvertently, rejected."[23]

As noted above, however, no such requirement exists for Superior Court Appellate Division panels.[24] It therefore becomes even more important that they be constituted with judges entirely separate from or hierarchically senior to the judge whose decision is being considered. There is no other way to ensure that appellate review will be conducted without fear or favor.

Because the current appellate panel composition is antithetical to the Constitutional demands for judicial independence, this is an important subject for appellate review. A decision by this Court will have dramatic and sanitizing implications for all appeals before the San Francisco Superior Court Appellate Division Panel.

IV. CONCLUSION

This petition deserves consideration because it raises serious issues involving (1) fundamental issues of due process in the context of the U.S. Supreme Court's decision attempting to ramp down out-of-proportion punitive awards; and (2) California's well expressed public policy that litigants be afforded meaningful judicial consideration of their claims by judges who without doubt are free from any questionable influences.

What gives these issues particular poignancy is the fact that even though they go to the very heart of our system of

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[23] *Id.* at 289.

[24] 24 Calif. Rules of Court, Rule 106(b).

justice, none of them has been addressed in a published opinion in this State.

Petitioner Catherine Coatney therefore respectfully requests an order transferring this case from the San Francisco Superior Court to this Court so that these important questions may receive the careful consideration they deserve.

DATE: September 24, 2004

LAW OFFICES OF MATTANIAH EYTAN

By: /s/_____
MATTANIAH EYTAN
Attorneys for Petitioner and Defendant Catherine Coatney, an individual and d.b.a. Catherine Coatney Designs

*** Word Count Verification and Certificate of Service omitted for this Appendix***

APPENDIX E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FIVE

A107825

[Filed October 13, 2004]

STEPHANIE KING, Plaintiff and Respondent,	)
v.	)
CATHERINE COATNEY, ET AL., Defendants and Appellants.	)

(San Francisco County Super. Ct. Appellate Division No. 149975)

BY THE COURT:

Appellant has presented this Court with a petition to transfer pursuant to Rule 64 of the California Rules of Court. We conclude that appellant has not shown that transfer of this matter is necessary to secure uniformity of opinion or settle an important question of law. (Cal Rules of Court, rule 64(b)(3). Therefore, the petition to transfer is denied.

Dated: October 13, 2004 /s/ _____
Jones, P.J.

APPENDIX F

IN THE

SUPREME COURT OF CALIFORNIA

[Filed October 22, 2004]

STEPHANIE KING,	)
Plaintiff,	)
	)
v.	)
	)
CATHERINE COATNEY,	)
an individual and d.b.a.	)
CATHERINE COATNEY DESIGNS,	)
Defendant.	)
	)

After a Court of Appeal Decision Denying Certification
First Appellate District, Division Five
A107825
San Francisco County Superior Court
App. Div. No. 149975

PETITION FOR REVIEW

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I. ISSUES PRESENTED

Issue No. 1

Whether the Labor Commissioner, when claiming attorneys fees, may rely on a special statutory scheme in order to avoid a general statutory scheme?

Issue No. 2

In the context of a limited jurisdiction case, is a fee award that is layered on top of statutory sanctions invalid if it bears no rational relationship to the underlying judgment?

Issue No. 3

As a general rule in California, if an employer during a trial *de novo* betters its position, without actually prevailing, does an inordinately heavy penalty in the form of attorneys fees comport with the United States Supreme Court s recent pronouncement that lower punitive awards are to be preferred unless the defendant s underlying conduct is particularly egregious?

Issue No. 4

Is a Superior Court Appellate Division panel unconstitutional if the judges assigned to it come from the same Court as the judges whose decisions are up for review?

II. BACKGROUND

After respondent Stephanie King successfully claimed that her employer, appellant Catherine Coatney, was late in paying

$17.22 in wages,[1] the Labor Commissioner imposed $480 in statutory sanctions against Coatney.[2] At a trial de novo,[3] the Labor Commissioner exercised its option under Calif. Labor Code ° 98.4 to defend King.[4] Following a trial de novo, the trial court awarded King $240 in sanctions (an amount that was half that which the Labor Commissioner originally awarded).[5]

Coatney moved for a new trial,[6] the trial court denied the motion,[7] and Coatney appealed.[8] While Coatney s appeal from the $240 penalty award was pending, the Labor Commission sought $5,000 in attorneys fees, payable to the government.[9] The trial court awarded the requested fees,[10] but reduced the amount to $3,025.[11]

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[1] Record on Appeal (R.A.) 123-124 at ¿¿ 2-3, R.A. 57.

[2] R.A. 57.

[3] R.A. 59.

[4] R.A. 124 at ¿ 3.

[5] R.A. 61-63.

[6] R.A. 24.

[7] R.A. 25.

[8] R.A. 24.

[9] R.A. 65-67.

[10] R.A. 26.

[11] R.A. 81-88.

After the trial court issued its fee award, the appellate panel affirmed without comment the $240 in sanctions awarded against Coatney.[12] The Labor Commissioner then filed the request for attorneys fees at issue here, a request that purported to address all matters (including appellate matters) that had taken place since the fees it had already received.[13] The Labor Commissioner claimed that, on this second round of attorneys fees, it was entitled to $21,750.[14]

Relying on Calif. Labor Code ° 98.2(b), the trial court ruled that, although Coatney bettered her position through the de novo trial, the fact that she did not reduce the award against her to zero meant that she had to pay a sanction for an unmeritorious appeal, the sanction to take the form of attorneys fees.[15] The Court ultimately awarded the Labor Commissioner $10,000 in fees.[16] Coatney contended that even this amount was erroneously awarded, and appealed the award.

The Appellate Division panel denied both the appeal and a subsequent request for certification of issues.[17] The Appellate Division panel that made these two rulings is

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[12] R.A. 90-91.

[13] R.A. 8-44.

[14] *Id.*

[15] R.A. 26, 65-67, 81-88.

[16] Id.

[17] The Appellate Division s orders are appended hereto as Exhibits A and B.

composed of judges who are colleagues sitting on the same Court with the judge who issued the order being reviewed.[18]

On October 13, 2004, the Court of Appeal, First Appellate District, denied Coatney s petition to transfer.[19]

III. WHY REVIEW SHOULD BE GRANTED

All four legal issues presented here involve important constitutional and legal questions that need to be resolved.[20] The first three issues revolve around the fact that under California law employers are unfairly penalized with sanctions, even if when they are engaging in conduct that, on its face, demonstrates that the employers have acted properly and legally. Thus, as matters now stand, an employer who is on the receiving end of an improperly inflated sanction award imposed by the Labor Commissioner, and who properly reduces that award to the correct amount, is nonetheless obligated to pay as sanctions the Labor Commissioners legal fees.

Aside from being unfair on its face, this scenario which is set out in the statutory scheme implicates seriously constitutional concerns. As is discussed at greater length below, the sanctions imposed upon an employer for having the temerity to challenge an improperly inflated Labor Commissioner award violate Constitutional prohibitions against allowing special statutes to override general statutes;

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[18] *Id.*

[19] The Court of Appeal s order is appended hereto as Exhibit C.

[20] Calif. Rules of Court, Rule 28(b)(1).

and implicates both due process and California jurisdictional concerns. Indeed, the present procedural scheme is an invitation for the Labor Commissioner to inflate sanctions against the employer precisely so that it can reap the benefit of attorneys fees from a trial de novo.[21]

In addition to challenging the constitutionality of the way in which the current statutory scheme is being interpreted, this petition also addresses the unconstitutional make-up of the San Francisco Superior Court Appellate Division panel. Despite the fact that the California constitution and the California statutory scheme mandate that the Appellate Division panel in the consolidated Superior Court system must be independent of the judges whose decisions are being reviewed, the actual make-up of the San Francisco Superior Court Appellate Division panel is not set up to reflect this required independence.

IV. LEGAL DISCUSSION

A. The Labor Commissioner s ability to circumvent general legislation aimed at preventing the Labor Commissioner from seeking attorneys fees from employers violates the Constitutional prohibition against allowing a special statute to override an applicable general statute.

The Labor Commissioner may challenge employment practices either under a general statutory scheme[22] (which

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[21] Petitioner is not in any way implying that she is aware of this type of misconduct. She is simply pointing out that the statutory scheme invites it.

[22] Calif. Labor Code ° 218.5.

explicitly denies the government attorneys fees) or under a special statutory scheme[23] (which explicitly allows such fees). Here, the government used the special statutory scheme as a basis to have fees imposed against the employer, Catherine Coatney.

The government s apparent ability to circumvent the fee prohibition under the general scheme, and benefit from the narrow right to fees under the special scheme is an important legal issue since it implicates constitutional concerns. The California Constitution mandates that [a] local or special statute is invalid in any case if a general statute can be made applicable.[24] Under this constitutional provision, [a] law is special . . . when it is not founded on a natural, intrinsic, or constitutional distinction which reasonably justifies difference in treatment.[25]

This issue has important public policy concerns. As matters now stand, the Labor Commissioner is allowed to use the special legislation in Calif. Labor Code ° 98.2(b) to circumvent a general proscription against its collecting attorneys fees in *de novo* trials. This leads to the possibility that, in situations in which a sanction against an employer is genuinely merited, the Labor Commissioner could impose inflated sanctions, on the theory that it is a no-lose situation.[26]

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[23] Calif. Labor Code ° 98.2(b).

[24] Calif. Const., art. IV, ° 16(b).

[25] *Lelande v. Lowery* (1945) 26 Cal.2d 224, 232 [157 P.2d 639].

[26] As noted, above, petitioner is not contending that this conduct has occurred. She is merely noting that the interpretation

If the employer acquiesces without seeking appeal through a trial *de novo*, the Labor Commissioner s office can view itself as Robin Hood taking from the rich (i.e., the employer) and giving to the poor (i.e., the employee) regardless of the legal justification for that payment. If the employer objects to this gratuitous overcharge, the benefit to the Labor Commissioner for rendering this improper ruling increases. Under Calif. Labor Code ° 98.2(b), which is special legislation counter to the general legislation denying attorneys fees to the Labor Commissioner, an employer who seeks *de novo* review of Labor Commissioner sanction is forced to pay attorneys fees unless it reduces the Labor Commissioner award to zero.

Since our hypothetical here supposes a situation in which some penalty was required, and the Labor Commissioner merely inflated it, the employer cannot reduce the penalty to zero, and the Labor Commissioner, which is already funded by taxpayers, can use this special legislation to obtain a windfall at the employer s expense. This hypothetical scenario, which precisely parallels the facts in this case, is unfair, illegal, rewards improper government conduct, and is completely destructive to California businesses. Significantly, this type of conduct could not occur if this Court issued a decision mandating that, in terms of attorneys fees, the Labor Commissioner is bound by the proscription in ° 218.5.

This Court should therefore determine whether the Labor Commissioner can unilaterally decide to invoke a special rule that encourages it to abuse its authority, when there is a general rule in place that prevents that type of abuse.

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currently placed on the statutory scheme invites this type of conduct.

B. The policy underlying California authority placing jurisdictional cap on fees should also apply in cases where the sanctions in the form of attorneys fees are grossly disproportionate to sum at issue in the case.

In this limited jurisdiction case, the trial court awarded, and the appellate division affirmed, fees that are 581 times greater than the unpaid wages that gave rise to the right to fees, and 42 times greater than the penalty imposed for late payment of wages.

California Courts have not addressed the proportionate relationship between attorneys fees and awards in a limited jurisdiction case. Only one published decision comes even close to addressing the issue, since it places a jurisdictional cap on fees by holding that the fees, when combined with the judgment, may not exceed the jurisdictional limit.[27] Even that case, however, does not address a situation, such as that found here, where the judgment imposes a nominal payment on the defendant, and the attorneys fees are a disproportionate multiplier of that amount. This Court should set proportionality guidelines for all current and future claimants in limited jurisdiction actions.

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[27] *Bakkebo v. Municipal Court* (1981) 124 Cal.App.3d 229, 236 [177 Cal.Rptr. 239].

C. This Court should bring California law in line with the ruling from the United States Supreme Court that enormous punitive damage awards should only be applied in cases involving egregious conduct.

Although, at the trial *de novo*, Coatney was unable to reduce the Labor Commissioner s penalty against her to zero, she successfully halved that penalty, reducing it from $480 to $240. Nevertheless, as a penalty on top of that penalty, the trial court imposed attorneys fees against her that are 581 times greater than the unpaid wages that gave rise to the right to fees, and 42 times greater than the penalty imposed for late payment of wages.

In other words, the Labor Commissioner was rewarded (above and beyond the monies it already receives annually from taxpayers) for having imposed an improperly inflated sanction in the first place. The United States Supreme Court recently held that lower punitive awards are to be preferred unless the defendant s underlying conduct is particularly egregious.[28] The trial court award here violates the principles underlying the Supreme Court s decision.

The United States Supreme Court held that, in punitive damage cases, useful guidelines would suggest that punitive damages be limited to about nine times the underlying award, with a preferred target of four times the underlying award. The Supreme Court acknowledged that, [w]hile these ratios are not binding they are instructive. They demonstrate what

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[28] *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 155 L.Ed.2d 585].

should be obvious: Single-digit multipliers are more likely to comport with due process. . . .[29]

Significantly, the Supreme Court continued by noting that:

> [B]ecause there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages.[30]

The question, then, is whether, in statutory penalty cases where a defendant employer successfully proves that the Labor Commissioner imposed incorrect penalties in the first instance, the employer s success at trial can be characterized as egregious conduct that entitles the Labor Commissioner to penalties (in the form of attorneys fees) that are hundreds of times greater than the underlying wages at issue. The inherent absurdity in equating success at trial with egregious conduct leaves little doubt as to the proper answer.

D. This Court should correct the fact the San Francisco Superior Court s Appellate Division Panel is inherently unconstitutional, insofar as it is composed of judges who are being asked to review their colleagues decisions.

In 1998, Proposition 220 passed, merging the Superior and Municipal Courts. Since unification, there is only *one*

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[29] *Id* at 538 U.S. at 425, 123 S.Ct. at 1524.

[30] *Id.*

court that handles two different types of cases limited and unlimited:

> The parties in their briefs refer to the two departments involved in the instant trial court proceedings as the limited civil court (or limited jurisdiction court), as distinguished from the unlimited civil court (or unlimited jurisdiction court). These are misleading misnomers. *After unification, however, there is only one court the superior court* [citation]; in the superior court, there are either limited civil cases or unlimited civil cases. [Citations.][31]

At the same time, the California Constitution was explicitly amended to ensure that this merger would not affect independent appellate review of cases that were formerly Municipal Court cases, and that are now classified as Superior Court Limited Jurisdiction Cases:[32]

> In each superior court there is an appellate division. The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial

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[31] *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1036, fn. 1 [126 Cal.Rptr.2d 310] (emphasis added), *citing TrafficSchoolOnline, Inc. v. Superior Court* (2001) 89 Cal.App.4th 222, 228 [107 Cal.Rptr.2d 412] and Code Civ. Proc. ° ° 85, 88, 89.

[32] This was not a problem prior to Proposition 220, since the Appellate Department was made up of Superior Court judges who independently reviewed decisions by Municipal Court judges. These were two separate bodies and there was no concern about offending a colleague, especially a senior one.

> Council *to promote the independence of the appellate division.*[33]

Acting on the Constitutional imperative regarding appellate division independence, the Legislature amended Calif. Code Civ. Proc. ° 77:

> In every country and city and county, there is an appellate division of the superior court consisting of three judges or, when the Chief Justice finds it necessary, four judges.
>
> The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence and quality of each appellate division. Each judge assigned to the appellate division of a superior court shall be a judge of that court, a judge of the superior court of another county, or a judge retired from the superior court or a court of higher jurisdiction in this state.[34]

The Law Revision Commission Comment following ° 77 also emphasizes the statement that the appellate panel s independence is a mandatory requirement:

> Subdivision (a) requires adoption of court rules intended to promote the independence and quality of judges serving in the appellate division. *See Cal. Const. art. VI, ° 4 (expressly recognizing the goal of*

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[33] Calif. Const, art. VI, ° 4 (emphasis added).

[34] Calif. Code Civ. Proc. ° 77(a) (emphasis added).

promoting the independence of the appellate division).[35]

The Commission elaborates on the three statutory directives for setting up an independent appellate division panel. The Commission strongly implies that, if the appellate panel judges can meet only the first suggestion that they be judges from the Superior Court at issue and are not from a group of judges outside that specific court, the panel should, at the very least, consist of senior judges with august reputations:

> Rules may provide relevant factors to be used in making appointments to the *appellate division, such* as length of service as a judge, reputation within the unified court, and degree of separateness of the appellate division workload from the judge s regular assignments (e.g., a superior court judge who routinely handles large numbers of misdemeanors might ordinarily not serve in the appellate division). Review by a panel of judges might include judges assigned from another county in appropriate circumstances, or even by a panel of appellate division judges from different superior courts who sit in turn in each of the superior courts in the circuit.[36]

In other words, a Superior Court s Appellate Division panel must be configured to ensure that the judges on the panel have maximum independence. Only in this way can the panel s legal interpretations be free from concerns about

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[35] Calif. Code Civ. Proc. ° 77, Law Revision Commission Comments (emphasis added).

[36] *Id* (emphasis added).

offending a colleague. In practical fact, this can only be done by placing on the panel judges with no relationship to those who decide the unlimited jurisdiction cases (something easily accomplished by using retired judges or judges from nearby, but unrelated districts).[37]

San Francisco Superior Court, blessed with easy geographic access to other Superior Courts and an abundance of retired judges, opted for a panel configuration patently antithetical to independence. It is staffed with judges from precisely the same Court as those judges whose opinions are being reviewed.

Even if this issue did not implicate both state and federal constitutional concerns, it would still be especially important because the legitimacy of the common law legal system rests in large part on the faith people have in that system. Knowing that the appeal from a judge s decision will be considered by an independent panel is just as important to the appearance of justice as the absolute right a litigant has to challenge a judge whom he believes is biased against him, regardless of his ability to prove that bias.[38]

The justification for the right to recuse a judge is, of course, a substantial right and an important part of California's system of due process that promotes fair and

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[37] It places an impossible burden on collegiality to have ones colleagues sit in judgment upon one. Recognizing this problem, the Judicial Commission appropriately suggested that, as a very last resort, the panel judges should always be the senior-most judges at the court. Calif. Code Civ. Proc. ° 77, Law Revision Commission Comments.

[38] Calif. Code Civ. Proc. °170.6.

impartial trials and confidence in the judiciary.[39] This justification applies with even greater force to the right to a properly constituted appellate panel. Without confidence in the judiciary, the whole system collapses.

The same focus on independent judicial function appears as well in the long-standing doctrine holding that one judge within a single court may not overrule another judge in the same court.[40] This rule is absolutely necessary to ensure continued confidence in the legal system s integrity.[41]

The fact is that placing judges on an appellate panel who must consider a ruling by a colleague undermines public confidence in these panels. The panel judges will likely be perceived as beholden to or fearful of their colleagues on the same court.

Another problem arises because there is no way to examine the Appellate Division panel decisions for evidence of improper influences because, unlike the Supreme and Appellate courts, appellate division panels need not write

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[39] *Stephens v. Superior Court* (2002) 96 Cal.App.4th 54, 61-62 [116 Cal.Rptr.2d 616].

[40] *Davcon, Inc. v. Roberts & Morgan* (2003) 110 Cal.App.4th 1355, 1361 [2 Cal.Rptr.3d 782] (noting the general principle that one trial court judge may not reconsider and overrule a ruling by another trial court judge, unless the first judge is unavailable). *See also Board of Medical Quality Assurance v. Superior Court* (1988) 203 Cal.App.3d 691,703 [250 Cal.Rptr. 182], *rev. denied*; *People v. Woodard* (1982) 131 Cal.App.3d 107, 111 [182 Cal.Rptr. 254].

[41] *In re Alberto* (2002) 102 Cal.App.4th 421, 427 [125 Cal.Rptr.2d 526], as modified.

decisions explaining how they arrived at the outcome of the matters before them.[42]

The requirement that Supreme Court and Appellate Court panels write decisions is designed to ensure that the reviewing court gives careful thought and consideration to the case. . . .[43] This statement of reasons indicate[s] that appellants contentions have been reviewed and consciously, as distinguished from inadvertently, rejected.[44]

As noted above, however, no such requirement exists for Superior Court Appellate Division panels.[45] It therefore becomes even more important that they be constituted with judges entirely separate from or hierarchically senior to the judge whose decision is being considered. There is no other way to ensure that appellate review will be conducted without fear or favor.

Because the current San Francisco Superior Court Appellate Division panel composition is antithetical to the Constitutional demands for judicial independence, this is an important subject for appellate review. A decision by this Court will have significant implications for all appeals before the San Francisco Superior Court Appellate Division Panel.

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[42] Calif. Const., art. VI, ° 14.

[43] *People v. Rojas* (1981) 118 Cal.App.3d 278,288 [174 Cal.Rptr. 91].

[44] *Id.* at 289.

[45] Calif. Rules of Court, Rule 106(b).

V. CONCLUSION

This petition deserves consideration because it raises serious issues involving (1) fundamental issues of due process in the context of the U.S. Supreme Court s decision attempting to ramp down out-of-proportion punitive awards; (2) statutory interpretations that violate Constitutional imperatives; and (3) California s well expressed public policy that litigants be afforded meaningful judicial consideration of their claims by judges who without doubt are free from any questionable influences.

What gives these issues particular urgency is the fact that even though they go to the very heart of our system of justice, none of them has been addressed in a published opinion in this State.

Petitioner Catherine Coatney therefore respectfully requests that this Court grant her Petition for Review so that these important questions may receive the careful consideration they deserve.

DATE: October 22, 2004

LAW OFFICES OF MATTANIAH EYTAN

By: /s/_____
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*** APPENDIX OF EXHIBITS, WORD COUNT PAGE, AND PROOF OF SERVICE REDACTED TO CONSERVE SPACE ***

APPENDIX G

CAL. CIV. PROC. § 77 (West 2004)

(a) In every county and city and county, there is an appellate division of the superior court consisting of three judges or, when the Chief Justice finds it necessary, four judges.

The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence and quality of each appellate division. Each judge assigned to the appellate division of a superior court shall be a judge of that court, a judge of the superior court of another county, or a judge retired from the superior court or a court of higher jurisdiction in this state.

The Chief Justice shall designate one of the judges of each appellate division as the presiding judge of the division.

(b) In each appellate division, no more than three judges shall participate in a heating or decision. The presiding judge of the division shall designate the three judges who shall participate.

(c) In addition to their other duties, the judges designated as members of the appellate division of the superior court shall serve for the period specified in the order of designation. Whenever a judge is designated to serve in the appellate division of the superior court of a county other than the county in which that judge was elected or appointed as a superior court judge, or if the judge is retired, in a county other than the county in which the judge resides, the judge

shall receive expenses for travel, board, and lodging, ff the judge is out of the judge's county overnight or longer, by reason of the designation, that judge shall be paid a per diem allowance in lieu of expenses for board and lodging in the same amounts as are payable for those purposes to justices of the Supreme Court under the rules of the State Board of Control. In addition, a retired judge shall receive for the time so served, amounts equal to that which the judge would have received if the judge had been assigned to the superior court of the county.

(d) The concurrence of two judges of the appellate division of the superior court shall be necessary to render the decision in every case in, and to transact any other business except business that may be done at chambers by the presiding judge of, the division. The presiding judge shall convene the appellate division when necessary. The presiding judge shall also supervise its business and transact any business that may be done at chambers.

(e) The appellate division of the superior court has jurisdiction on appeal in all cases in which an appeal may be taken to the superior court or the appellate division of the superior court as provided by law, except where the appeal is a retrial in the superior court.

(f) The powers of each appellate division shall be the same as are now or may hereafter be provided by law or rule of the Judicial Council relating to appeals to the appellate division of the superior courts.

(g) The Judicial Council shall promulgate rules, not inconsistent with law, to promote the independence of, and govern the practice and procedure and the disposition of the business of the appellate division.

(h) Notwithstanding the provisions of subdivisions (b) and (d), appeals from convictions of traffic infractions may be heard and decided by one judge of the appellate division of the superior court.

(Added by Stats.1955, c. 527, p. 1000, § 1. Amended by Stats.1961, c. 937, p. 2570, § 1; Stats.1976, c. 1288, p. 5758, § 1; Stats.1984, c. 704, § 1; Stats.1998, c. 931 (S.B.2139), § 21, eff. Sept. 28, 1998; Stats.1998, c. 932 (A.B.1094), § 11.5, operative Jan. 1, 1999; Stats.1999, c. 344 (S.B.210), § 2, eft. Sept. 7, 1999; Stats.1999, c. 853 (S.B.832), § 1.5; Stats.2002, c. 784 (S.B.1316), § 26.)

LAW REVISION COMMISSION COMMENTS

2004 Electronic Update

1998 Amendment

Section 77 is amended to accommodate unification of the municipal and superior courts in a county. Cal. Const. art. VI, § 5(e).

Subdivision (a) requires adoption of court rules intended to promote the independence and quality of judges serving in the appellate division. See Cal. Const. art. VI, § 4 (expressly recognizing the goal of promoting the independence of the appellate division). Rules may provide relevant factors to be used in making appointments to the appellate division, such as length of service as a judge, reputation within the unified court, and degree of separateness of the appellate division workload from the judge's regular assignments (e.g., a superior court judge who routinely handles large numbers of misdemeanors might ordinarily not serve in the appellate division). Review by a panel of judges might include judges

assigned from another county in appropriate circumstances, or even by a panel of appellate division judges from different superior courts who sit in turn in each of the superior courts in the "circuit."

Subdivision (b) continues the rule that the appellate division sits in panels of three. A judge may not participate in appellate review of any proceeding that the judge tried or heard. Section 170.1(b).

Subdivision (e) is amended to reflect elimination of the justice court. Cal. Const. art. VI, §§ 1, 5(b). It is also amended to specify the jurisdiction of the appellate division in a unified superior court. For guidance on which civil cases are subject to the appellate jurisdiction of the appellate division, see Section 904.2 (taking appeal in limited civil case) and Constitution Article VI, Section 11.

Section 77 is amended throughout to replace references to the appellate department with references to the appellate division, and to replace references to the Chairperson of the Judicial Council with references to the Chief Justice. This is consistent with the terminology used in Constitution Article VI. [28 Cal.L.Rev.Comm. Reports App. 7 (1998)].

APPENDIX H

CAL.RULES OF COURT, Rule 6.603 (West 2004)

(a) [General responsibilities] With the assistance of the court executive officer, the presiding judge is responsible for leading the court, establishing policies, and allocating resources in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances service to the public. The presiding judge is responsible for:

(1) Ensuring the effective management and administration of the court, consistent with any rules, policies, strategic plan, or budget adopted by the Judicial Council or the court;

(2) Ensuring that the duties of all judges specified under rule 6.608 are timely and orderly performed; and

(3) Ensuring that the court has adopted written policies and procedures allowing the presiding judge to perform efficiently the administrative duties of that office.

(b) [Authority]

(1) The presiding judge has the authority to:

(A) Assign judges to departments and designate supervising judges for divisions, districts, or branch courts;

(B) Apportion the business of the court, including assigning and reassigning cases to departments;

(C) Call meetings of the judges;

(D) Appoint standing and special committees of judges;

(E) Act as the spokesperson for the court;

(F) Authorize and direct expenditures from the court's Trial Court Operations Fund; and

(G) Perform all acts necessary to accomplish the duties specified by the rules of court.

(2) No local rule or policy may limit the authority of the presiding judge as granted in the rules of court.

(c) [Duties]

(1) (Assignments) The presiding judge has ultimate authority to make judicial assignments. The presiding judge must:

(A) [Presiding and supervising judges] Designate a judge to preside in each department, including a master calendar judge when appropriate, and designate a presiding judge of the juvenile division and a supervising judge for each division, district, or branch court. In making judicial assignments, the presiding

judge must take into account the following: (i) the needs of the public and the court, as they relate to the efficient and effective management of the court's calendar; (ii) the knowledge and abilities demanded by the assignment; (iii) the judge's judicial and nonjudicial experience, including specialized training or education; (iv) the judge's interests; (v) the need for continuity in the assignment; (vi) the desirability of exposing the judge to a particular type of assignment; and (vii) other appropriate factors. Judicial assignments must not be based solely or primarily on seniority;

(B) [Master calendar judge] Assign to a master calendar judge any of the duties that may more appropriately be performed by that department;

(C) [Calendar] Supervise the court's calendar, apportion the business of the court among the several departments of the court as equally as possible, and publish for general distribution copies of a current calendar setting forth the judicial assignments of the judges and the times and places assigned for hearings;

(D) [Reassignments] Reassign cases between departments as convenience or necessity requires; and

(E) [Judge unable to act] Designate a judge to act if by law or these rules a matter is required to be presented to or heard by a particular judge and that judge is absent, deceased, or unable to act.

(2) (Judicial schedules)

(A) The presiding judge shall adopt a process for scheduling judges' vacations and absences from court for attendance at schools, conferences, workshops, and community outreach activities, and shall prepare a plan for these vacations and absences from court.

(B) The plan should take into account the principles contained in sections 25.1 through 25.3 (on judicial education) and section 39 (on community activities) of the Standards of Judicial Administration.

(C) The presiding judge shall review requests from judges for time absent from court and may approve any request that is consistent with the plan and with the orderly operation of the court.

(D) The presiding judge shall allow each judge to take two days of personal leave per year. Personal leave may be taken at any time that is approved by the presiding judge.

(E) The presiding judge shall allow the following number of days of vacation for each judge annually:

(i) 24 days for judges with less than 7 years of service as a California judge;

(ii) 27 days for judges with at least 7 but less than 14 years of service as a California judge; and

(iii) 30 days for judges with 14 or more years of service as a California judge.

(F) The presiding judge may authorize a judge to take more time off than is specified in subdivision (c)(2)(E) as justified by extraordinary circumstances, if the circumstances are documented and the authorization is in writing.

(G) The presiding judge, in his or her discretion, may allow a judge to take additional vacation days equal to the number of vacation days that the judge did not use in the previous year, up to a maximum of 30 such days. A court may, by local rule, establish a lower maximum number of such days. This subdivision applies only to vacation days accrued after January 1, 2001. It does not affect any unused vacation days that a judge may have accrued before January 1,2001, which are governed by local court policy, nor does it create any right to compensation for unused vacation days.

(H) The court shall, by local rule, define a day of vacation. Absence from court to attend an authorized education program, conference, or workshop for judges, or to participate in Judicial Council or other authorized committees or community outreach activities, shall not be considered vacation time if attendance is in accordance with the plan and has the prior approval of the presiding judge. Absence from court due to illness is not considered vacation time. This rule does not limit the time a judge may be absent from court when unable to work due to illness.

(I) To ensure compliance with the plan, the presiding judge shall establish a system to monitor judges' absences from court and maintain records of those absences.

(3) (Submitted cases) The presiding judge shall supervise and monitor the number of causes under submission before the judges of the court and ensure that no cause under submission remains undecided and pending for longer than 90 days. As an aid in accomplishing this goal, the presiding judge shall:

(A) Require each judge to report to the presiding judge all causes under submission for more than 30 days, and with respect to each cause, designate whether it has been under submission for 30 through 60 days, 61 through 90 days, or for over 90 days;

(B) Compile a list of all causes under submission before judges of the court which shall be designated as the submitted list and which shall include the name of each judge, a list of causes under submission before that judge, and the length of time each cause has been under submission;

(C) Circulate monthly a complete copy of the submitted list to each judge of the court;

(D) Contact and alert each judge who has a cause under submission for over 30 days and discuss ways to ensure that the cause is timely decided;

(E) Consider providing assistance to a judge who has a cause under submission for over 60 days; and

(F) Consider requesting the services of the Administrative Office of the Courts to review the court's calendar management procedures and make recommendations whenever any of the following

conditions exist in the court for the most recent three months:

(i) More than 90 civil active cases are pending for each judicial position; or

(ii) More than 10 percent of the cases on the civil active list have been pending for one year or more.

(4) (Oversight of judicial officers) The presiding judge shall:

(A) [Judges] Notify the Commission on Judicial Performance of

(i) A judge's substantial failure to perform judicial duties, including but not limited to any habitual neglect of duty, persistent refusal to carry out assignments as assigned by the presiding judge, or persistent refusal to carry out the directives of the presiding judge as authorized by the rules of court; or

(ii) Any absences caused by disability totaling more than 90 court days in a 12-month period, excluding absences authorized under subdivision (c)(2) of this rule.

(B) [Notice] Give the judge a copy of the notice to the commission under subdivision (A) if appropriate. If a copy is not given to the judge, the presiding judge shall inform the commission of the reasons why so notifying the judge was deemed inappropriate;

(C) [Commissioners] Prepare and submit to the judges for consideration and adoption procedures for receiving, inquiring into, and resolving complaints lodged against court commissioners and referees, consistent with rule 6.655, giving due consideration to section 16 of the Standards of Judicial Administration;

(D) [Temporary judges] Be responsible for the recruitment, training, supervision, approval, and performance of temporary judges; and

(E) [Assigned judges] For each assigned retired judge,

(i) Complete a confidential evaluation form;

(ii) Submit the form annually to the Administrative Director of the Courts;

(iii) Direct complaints against the assigned judge to the Chief Justice, by forwarding them to the attention of the Administrative Director of the Courts, and provide requested information in writing to the Administrative Director of the Courts in a timely manner; and

(iv) Assist the Administrative Director in the process of investigating, evaluating, and making recommendations to the Chief Justice regarding complaints against retired judges who serve on assignment.

(5) (Personnel) The presiding judge shall provide general direction to and supervision of the court executive officer or, if the court has no executive officer, perform the duties

of the court executive regarding personnel as specified in rule 6.610(c)(1).

(6) (Budget and fiscal management) The presiding judge shall:

(A) Establish a process for consulting with the judges of the court on budget requests, expenditure plans, and other budget or fiscal matters the presiding judge deems appropriate;

(B) Establish responsible budget priorities and submit budget requests that will best enable the court to achieve its goals; and

(C) Approve procurements, contracts, expenditures, and the allocation of funds in a manner that promotes the implementation of state and local budget priorities and that ensures equal access to justice and the ability of the court to carry out its functions effectively. In a court with an executive officer, the presiding judge may delegate these duties to the court executive officer, but the presiding judge shall ensure that the court executive officer performs such delegated duties consistent with the court's established budget.

(7) (Meetings and committees) The presiding judge shall establish a process for consulting with the judges of the court and may call meetings of the judges as needed. The presiding judge may appoint standing and special committees of judges as needed to assist in the proper performance of the duties and functions of the court.

(8) (Liaison) The presiding judge shall:

(A) Provide for liaison between the court and the Judicial Council, the Administrative Office of the Courts, and other governmental and civic agencies;

(B) Meet with or designate a judge or judges to meet with any committee of the bench, bar, news media, or community to review problems and to promote understanding of the administration of justice, when appropriate; and

(C) Support and encourage the judges to actively engage in community outreach to increase public understanding of and involvement with the justice system and to obtain appropriate community input regarding the administration of justice, consistent with the California Code of Judicial Ethics and section 39 of the Standards of Judicial Administration.

(9) (Planning) The presiding judge shall:

(A) Prepare, with the assistance of appropriate court committees and appropriate input from the community, a long-range strategic plan that is consistent with the plan and policies of the Judicial Council, for adoption in accordance with procedures established by local rules or policies; and

(B) Ensure that the court regularly and actively examines access issues, including, but not limited to, any physical, language, or economic barriers that impede the fair administration of justice.

(10) (Appellate records) The presiding judge is responsible for ensuring the timely preparation of records on appeal.

(A) The presiding judge ordinarily should delegate the following duties to the executive officer:

(i) Maintaining records of outstanding transcripts to be completed by each reporter;

(ii) Reassigning court reporters as necessary to facilitate prompt completion of transcripts; and

(iii) Reviewing reporters' requests for extensions of time to complete transcripts in appeals of criminal cases.

(B) After reasonable notice and hearing, the presiding judge shall declare any reporter of the court who is delinquent in completing a transcript on appeal not competent to act as a reporter in court, under Government Code section 69944.

(11) (Local rules) The presiding judge shall prepare, with the assistance of appropriate court committees, proposed local rules to expedite and facilitate court business in accordance with Government Code section 68071 and rules 981 and 981.1.

(d) [Delegation]

(1) (All courts) The presiding judge may delegate any of the specific duties listed in this rule to another judge or, if the duty does not require the exercise of judicial authority, to the court executive officer. The presiding judge remains

responsible for all duties listed in this rule even if he or she has delegated particular tasks to someone else.

(2) (Coordinated courts) Notwithstanding any other provision in this rule, any of the duties and responsibilities of the presiding judge may be transferred to a single presiding judge or oversight committee in accordance with rule 991 and an approved coordination plan.

(Adopted, eft. Jan. 1,2001. As amended, eff. Jan. 1, 2001; Jan. 1, 2002.)